IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1467

ARNOLD H. MIDTAUNE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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The United States, in its opposing brief in No. 78-1467, seeks to perpetuate by the sheer force of repetition a clearly erroneous reading of the search warrant affidavit upon which this petition is premised. Its brief also suggests that this Court has overruled a time-honored decision in a footnote.

On the first point, the Government continues to argue that information in the affidavit "indicated that petitioner had been involved in a fraudulent rent supplement scheme at least from August 1976 through January 1977." (Memorandum in Opposition, 3-4).

The paragraph of the affidavit from which this incorrect assumption is made reads as follows:

> "Daniel Dodge, Deputy U.S. Marshal, Minneapolis, Minnesota, advised your affiant that a confidential informant who has provided reliable information to him in the past received welfare benefits based on the fact she made a fraudulent claim for welfare benefits which reflected she resided at a certain address where he knew she did not reside. Your affiant has reviewed records of the Hennepin County Welfare Department which reflect that payments were made by that Department based on a claim that this informant was residing at an apartment located at 22 Oak Grove, Minneapolis, Minnesota, during the period of August, 1976, through January, 1977."
> (Pet. 4-5)

A commonsense reading of that paragraph compels the following literal interpretation:

1. The allegation was not made by an unnamed informant. Rather, it reflects the personal suspicion or belief of the Deputy U.S. Marshal. To attribute this information to the informant one would have to supply the following language:

> "Daniel Dodge, Deputy U.S. Marshal, Minneapolis, Minnesota, advised your affiant that a confidential informant who has provided reliable information to him in the past *informed him that she had* received welfare benefits based on the fact she made a fraudulent claim, etc."

To approve the Government's reading of this sentence would open the door to easy circumvention of the "four corners" doctrine announced in *Giordinello v. United States*, 357 U.S. 480 (1958). In that case the Court held that in passing upon

the validity of a warrant, the Court may consider only information brought to the attention of the magistrate. It is impossible to find a statement against penal interest on the face of this affidavit, and the magistrate erred in presuming otherwise.

2. The second sentence of the paragraph in question did not implicate the petitioner in a scheme to defraud by use of the mails or by any other means. This point was conceded by the reviewing magistrate (Pet. 12) but overlooked by the Government in its brief.

3. Even if the informant herself had made a statement against penal interest, and even if that statement and the independent corroboration had implicated the petitioner, the information would still have to pass the tests enunciated in *Sgro v. United States*, 287 U.S. 206 (1932) and its progeny. This isolated allegation would be thirteen months ancient—exceeding the permissible lapse in *Andresen v. Maryland*, 427 U.S. 463 (1976), by ten months.

The Government's additional reliance upon *United States v. Forsythe*, 560 F.2d 1127 (3d Cir. 1977), adds little to its argument, since the information in that affidavit was only one month old and since the documents sought were bail bonds which the Court correctly noted are, in all probability, retained for more than one month. *United States v. Forsythe*, 560 F.2d 1127, 1132.

4. Petitioner was not indicted for any offense alleged to have occurred during the period August, 1976, to January, 1977. (Indictment, Dist. Ct. No. 4-78-30.) The Government's argument that "petitioner had been involved in a fraudulent rent supplement scheme at least from August 1976 through

January 1977" is, therefore, under all of the circumstances a transparent attempt to perpetuate a faulty reading of the affidavit.

Apart from a misreading of the affidavit, the Government seems to be suggesting in its brief that the Supreme Court has overruled the decision in *Sgro v. United States*, 287 U.S. 206 (1932) with a footnote contained in *Andresen v. Maryland*, 427 U.S. 463, 478-479, n.9 (1976). The facts distinguishing *Andresen* from the present case were discussed in the Petition filed herein (Pet. 14). To reiterate, the *Andresen* Court found that the petitioner's staleness argument was "belied by the particular facts of the case." 427 U.S. 463, 479, n.9. In addition, the warrant-supporting affidavits were unusually "complete" and "thorough". 427 U.S. 463, 478, n.9.

The petitioner respectfully contends that the holding in *Sgro* is *stare decisis* on the issue of staleness in search warrant affidavits. While the Government correctly notes that there is no arbitrary rule on how long a lapse of time is tolerable in these cases (Memorandum in Opposition, 3), it is evident from their treatment of the facts in the present case that they are suggesting that the timeliness requirements of the Fourth Amendment no longer have any meaning.

In light of the Government's misreading of the affidavit and its gross distortion of the *Andresen* decision, the need for review of the action below is indisputable.

Respectfully submitted,

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